

Administrative Conference of the United States
Office of the Chairman

Resource Papers in Administrative Law



An Introduction to ADR and the Roster of Neutrals

ABOUT THE CONFERENCE. . . .

The Administrative Conference of the United States was established by statute as an independent agency of the federal government in 1964. Its purpose is to promote improvement in the efficiency, adequacy, and fairness of procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions.

To this end, the Conference conducts research and issues reports concerning various aspects of the administrative process and, when warranted, makes recommendations to the President, Congress, particular departments and agencies, and the judiciary concerning the need for procedural reforms. Implementation of Conference recommendations may be accomplished through direct action on the part of the affected agencies or through legislative changes on the part of Congress.

Marshall J. Breger, *Chairman*
October 1989

ABOUT THE ROSTER OF NEUTRALS. . . .

The Roster contains information on mediators, dispute resolution specialists and other "neutrals" available to assist in resolving disputes regarding federal agencies or statutes. Agency officials and parties to disputes can request names and pertinent data from the Roster.

THE CONFERENCE ROSTER OF NEUTRALS

What Is the Administrative Conference "Roster of Neutrals"?

The Administrative Conference Roster of Neutrals contains names of dispute resolution specialists available to help resolve conflicts that arise involving federal agencies or statutes. Agency officials and parties to disputes can request names and pertinent information from the Roster to identify dispute resolution specialists in a timely manner.

Who Is Listed on the Roster?

The Roster contains the names of individuals and organizations whose activities include mediation, facilitation, arbitration, or other alternative dispute resolution services. The Roster lists neutrals with expertise in most of the processes given in the chart on pages 4 and 5. Users should remember, though, that under current law agencies generally refrain from agreeing to have outside arbitrators rule on the liability of the United States except where the dispute concerns the amount, rather than the existence, of a claim.

Neutrals must request listing on the Roster and must:

- Disclose required information on training and experience and certify before a notary public that all information submitted is accurate.
- Agree to abide by the code of conduct of the Society of Professionals in Dispute Resolution or other applicable codes of conduct.
- Agree to allow the Administrative Conference to provide as references the names, addresses, and telephone numbers of parties in cases the neutral has previously handled.
- Agree to abide by rules and regulations established by the Administrative Conference of the United States.

The Conference does not guarantee the accuracy of information in its files describing neutrals' qualifications, nor does it certify neutrals' ability.

AN INTRODUCTION TO ALTERNATIVE DISPUTE RESOLUTION

What Exactly Is "ADR"?

ADR refers to a diverse array of dispute resolution approaches, often involving a neutral third party, that can assist disputing parties resolve disagreements. These approaches, which can help avoid administrative hearings and litigation, include mediation, minitrials, settlement judges, factfinding, negotiated rulemaking, and arbitration. The procedures and selection criteria are set forth in chart form on pages 4 and 5. Rather than replace more traditional approaches, ADR expands disputants' options for resolving conflicts.

Why Should You Consider an ADR Approach?

Traditional approaches to resolving conflicts, such as agency adjudication, rulemaking, and courtroom litigation, can be protracted and expensive. In addition, adjudication and litigation often do not succeed in settling the real issues underlying a dispute. Any party seeking a prompt, equitable resolution to the fundamental issues in a dispute under a federal agency program or statute should consider ADR.

In the face of overwhelming demands on American administrative and judicial systems, ADR approaches offer valuable opportunities to resolve disputes quickly and satisfactorily. One source, for instance, estimates minitrials have a 95 percent settlement rate and cost about 3 percent of a traditional trial. Of 150 "unsettleable" lawsuits referred to summary jury trial by one U.S. District Court judge over a 6-year period, 97 percent resulted in settlement.

What Can an ADR Approach Achieve?

Federal agencies have successfully used ADR approaches to negotiate potentially controversial rules (e.g., EPA, Department of Transportation, and OSHA), to reach financial settlements using minitrials (e.g., Navy and Army Corps of Engineers) and to mediate disputes between citizens and public entities (e.g., U.S. Forest Service and EPA).

Private businesses have also benefited considerably by using ADR. Fortune 1000 companies have signalled a vote of confidence in ADR's ability to provide:

- Savings in time and money.
- Confidential negotiating forums, where appropriate.
- Relevant expertise on the part of the neutral.
- Opportunities to maintain valuable working relationships.

With the soaring incidence and cost of litigation, officials from agencies owe it to American taxpayers, and businesses and individual disputants owe it to themselves, to become informed consumers of ADR services. By offering options for tailoring dispute resolution processes to the circumstances of the individual dispute, agencies can save themselves and private disputants staff time and disruption, legal expenses, and out-of-pocket costs. They can also reach outcomes that meet their real needs far better than litigation.

When Is ADR Effective?

ADR might be effective in any one or more of the following circumstances:

- Traditional process does not promise to determine issues efficiently among the disputants.
- Value of the disputed issue itself is dwarfed by the potential cost and disruption to both sides of a traditional dispute resolution.
- Disputants desire to avoid publicity. (This does not apply to negotiated rulemaking, which is not a closed process.)
- Disputants wish to maintain or reestablish a good working relationship.
- There is a need to settle the dispute quickly.
- An ADR neutral or panel with subject area expertise can understand and help the parties deal with the complexities of the case better than could a judge or hearing officer.
- Dispute involves factual or other nonprecedential issues.

Disputants in any given conflict are generally free to develop mutually acceptable ADR approaches to accommodate their particular dispute. Practice has spawned innumerable variations, and more than one approach may be combined in a single dispute. The procedures described in the chart, therefore, are only a starting point.

ADR may not be as effective if one or more of the following conditions is present:

- A disputant prefers to litigate for strategic reasons.
- There is a need to establish a precedent or develop important social policy.
- Delay will benefit one of the disputants.

Will ADR Work?

Available data indicate that agreements are reached in about 80 percent of cases involving ADR in which parties seeking resolution have authority to make and implement an agreement. While you cannot ensure that the approach you select will totally resolve your dispute, in many situations using ADR increases the likelihood of an acceptable resolution.

Even when ADR approaches do not result in agreements that are acceptable to all parties, the resources invested in the effort are not lost. The disputants remain free to take their conflict to hearing or to court, and preparations for ADR processes contribute to the development of a traditional case. In addition, because ADR processes encourage participants to narrow issues and to identify and address their most fundamental concerns early on, subsequent dispute resolution efforts in traditional forums, if needed, tend to be more focused and efficient.

ADR PROCESSES AND SELECTION CRITERIA

NONBINDING PROCESSES	DEFINITION/PURPOSE	SELECTION CRITERIA
Conflict Assessment/Convening	Identify possible approaches for resolution reflecting parties' interests.	Preliminary step used to select appropriate ADR process.
Mediation/Facilitation/Conciliation	Voluntary, private process using skilled neutral to help disputants negotiate mutually acceptable solution.	Useful when several issues/parties, poor communication/personality clashes; want confidentiality, focus on content.
Negotiated Rulemaking	Formal process initiated by agency promulgating regulation. If convenor recommends negotiation, neutral-led discussions including interested parties can effect acceptable solution.	Used when agency issues or revises rule, especially when controversy expected. Front-end resources expended to save greater long-term costs. Result is proposed rule.
Minitrial	Voluntary, structured settlement process. Parties present core arguments to authorized principals, who then negotiate. Neutrals sometimes preside, mediate or offer advisory opinions.	Useful in variety of disputes at many stages. Apt where parties are willing to share pertinent data, desire perspective on strengths and weaknesses, or want prompt resolution by real decisionmakers.

Summary Jury Trial

Disputants present evidence at brief mock trial with mock jury. After advisory verdict, presiding official may assist disputants negotiate.

Same as "Minitrial"

Neutral Evaluation/Factfinding

Unbiased input on technical aspects of dispute from subject matter specialist. Results may be admissible in court, as parties agree. Usually voluntary.

Same as "Minitrial"

Settlement Judge

Mediation or discussions by disputants before neutral, generally a judge other than the presiding one. Generally voluntary.

Same as "Minitrial"

Nonbinding Arbitration

Decision from disputant-approved neutral. Parties not required to accept decision. Process more formal than mediation.

Same as "Minitrial"

BINDING PROCESSES**Binding Arbitration/Private Judging**

Parties required to accept decision from disputant-approved neutral. Decision subject to limited judicial review.

Used when disputants need special expertise and do not care to set precedent or wish to avoid publicity; when pertinent information can be shared and a prompt, definitive resolution is desired.

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The Conference does not guarantee the accuracy of information in its files describing neutrals' qualifications, nor does it certify neutrals' ability.

Users of the Roster should make their own inquiries as to the accuracy of the information provided, and select neutrals on the basis of their needs in a particular dispute.

How Can You Select a Neutral from the Roster?

If you are a party to a dispute involving a federal agency or statute, you may request from the Conference the names and brief professional biographies of one or more neutrals listed on the Roster. The Conference can, in its discretion, make the Roster available to parties in private or state government disputes. (A sample Request for Neutrals Form is on pages 10 and 11.)

When the Conference receives your request, staff members will search the Roster listings for neutrals who appear to be qualified based on their (1) experience, (2) subject matter expertise, (3) organizational affiliations, (4) location, (5) education or training, or (6) other characteristics you specify. Once the Conference has supplied names it is up to those involved in the dispute to select a mutually acceptable neutral.

What Should You Look for in a Neutral?

Once you have received names and background information from the Roster, you and others involved in the dispute will probably want to interview those neutrals whose assistance you are considering enlisting. The role of a dispute resolution specialist usually is *to manage the processes* by which disputants resolve their conflict. In selecting a neutral you should focus on a neutral's style, character, and experience with alternative dispute resolution processes relevant to your dispute.

During your interview with a candidate neutral, be sure to discuss potential scheduling conflicts and conflicts of interest that might arise if the neutral were selected. (The Conference requires neutrals listed on the Roster, at a minimum, to disclose any such conflicts before beginning dispute resolution efforts.)

If you are considering retaining a neutral listed on the Roster, you may wish to contact, as references, parties to disputes your candidate neutral has helped resolve in the past. These parties should be able to provide insights regarding the character, style, and professional skill of the neutrals. The Conference will supply you with the names, addresses, and telephone numbers of such parties when it sends you a set of neutrals' names.

What if the Disputants Cannot Agree on a Neutral?

If the parties to the dispute cannot agree on a neutral after reviewing the names provided, they may jointly request a second list of names selected from the Roster. The Conference will supply up to three sets of names for any one dispute. The parties may also jointly ask the Conference to select a neutral for them if they are unable to do so. The Conference may honor such a request at the discretion of the Chairman.

Is There a Fee for Using the Roster?

While the Conference reserves the right to charge fees for being listed on the Roster and for using the Roster, there is currently no charge for these services. Neutrals listed on the Roster, however, do charge for services rendered in accordance with fee schedules provided in their professional biographies. Neutrals listed on the Roster generally charge from \$75 to \$200 per hour, depending on individual background.

What Happens After You Select a Neutral?

Once the parties to the dispute have arranged for the services of a neutral from the Roster, they should notify the Conference of their selection. The Conference would also like to be notified if the parties decide not to use any neutral.

At the conclusion of the dispute resolution effort, disputants are expected to notify the Conference of the outcome of the dispute. In addition, they will be asked to evaluate services related to using the Roster and the general effectiveness of the neutral so that the Conference can improve its program.

If you have a complaint about the ethical performance of a neutral whose name you obtained from the Roster, you should inform the Conference. Ethical complaints will be investigated and, if validated, are the only complaints that will be kept in a neutral's file. Other complaints or comments about individual neutrals, unrelated to ethics, will not be retained.

What Information Does the Conference Release from Its Files?

Disputants will receive neutrals' names, their biographical sketches, and their references (names, addresses, and telephone numbers of parties to disputes the neutral helped resolve). Supplemental information, such as letters of recommendation, will be released upon the disputants' request. In general, the Conference will not retain information about the details of particular conflicts. Users of the Roster who retain listed neutrals should understand that their names will be included in the record as references for future, potential users.

SAMPLE

REQUEST FOR NEUTRALS FORM

*** PLEASE TYPE OR PRINT ALL INFORMATION ***

1. Name of Requester: _____

2. Address: _____

3. Telephone Numbers: _____

4. Program or Statute involved _____

5. Are you a party to the dispute? Yes () No ()

6. Other parties to the dispute: _____

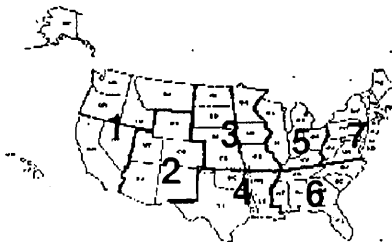
7. Please describe the dispute or conflict briefly (100 words or less):

8. Do you wish to limit the search for neutral candidates to specific states or regions of the country? (Choose (a), (b), or (c))

(a) Anywhere would be acceptable: _____

(b) Acceptable regions (see map): _____

(c) Acceptable states: _____



9. Number of neutral candidates requested:

☐ 5

☐ All who meet my specifications

☐ 10

☐ Other _____
(specify number)

10. If you wish to specify the types of neutral processes with which candidates should have actual experience, please check applicable types of cases below:

☐ Mediation/Facilitation/
Conciliation

☐ Designing/Administering
Dispute Resolution Programs

☐ Arbitration

☐ Neutral Factfinding

☐ Conflict Assessment

☐ Minitrial

☐ Convening

☐ Negotiated Rulemaking

☐ Court-appointed Special Master

☐ Settlement Judge

☐ Training

11. If you wish to specify the subject matter of cases with which candidates should have actual experience as neutrals, please check applicable boxes below:

☐ Agency Rulemaking

☐ Family/Divorce

☐ Commercial

☐ Farmer/Lender

☐ Community

☐ Government Contract

☐ Construction

☐ International

☐ Consumer

☐ Interpersonal

☐ Credit/Financial

☐ Intra-Organizational

☐ Education

☐ Land Use

☐ Employment/Discrimination

☐ Public Policy

☐ Environmental/Conservation

☐ Other (please specify) _____

12. If it will be necessary for the neutral to be fluent in a foreign language (or sign language), please specify: _____

13. Do you wish to specify a limit to the hourly rate of neutral candidates whose qualifications are submitted for your review? (Rate is generally from \$75 to \$200/hour.) If so, please specify upper limit: \$ ____/hour. If candidates *must* be willing to do pro bono work, please check ().

14. Please describe any other characteristics you wish a neutral candidate to possess: _____

FOR FURTHER READING. . .

Conference publications

Books

- Sourcebook: Federal Agency Use of Alternative Dispute Resolution (1987)
Agency Arbitration (1988)
Negotiated Rulemaking Sourcebook (1989)

Articles and Reports

- Colloquium on Improving Dispute Resolution: Options for the Federal Government*, 1 Administrative Law Journal 399 (1987)
- Arvil Adams and Jose Figueroa, *Expediting Settlement of Employee Grievances in the Federal Sector* (Administrative Conference 1985)
- Frederick Anderson, *Negotiation and Informal Action: The Case of Superfund*, 1985 Duke Law Journal 261, 1984 ACUS 263
- Richard K. Berg, *Legal and Structural Obstacles to the Use of Alternative Dispute Resolution in Federal Programs* (Administrative Conference 1987)
- George A. Bermann, *Administrative Handling of Monetary Claims: Tort Claims at the Agency Level*, 35 Case Western Law Review 509 (1985), 1984 ACUS 639
- Harold H. Bruff, *The Constitutionality of Arbitration in Federal Programs*, 1987 ACUS 533
- Eldon H. Crowell and Charles Pou, Jr., *Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation*, ACUS 1139, 48 Maryland Law Review ____ (1989)
- Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 Georgetown Law Journal 1 (1982), 1982 ACUS 301
- Philip J. Harter, *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, 1988 ACUS 839
- Philip J. Harter, *Points on a Continuum: Dispute Resolution Procedures and the Administrative Process*, 1 Administrative Law Journal 141 (1987), 1986 ACUS 165
- Daniel Joseph and Michelle Gilbert, *Breaking the Settlement Ice: The Use of Settlement Judges in Administrative Proceedings*, 1988 ACUS 281
- Henry H. Perritt, Jr., *Analysis of Four Negotiated Rulemaking Efforts*, 1985 ACUS 637; expanded version, *Negotiated Rulemaking: An Evaluation*, 74 Georgetown Law Journal 1625 (1986)
- George D. Ruttinger, *Acquiring the Services of Neutrals for Alternative Means of Dispute Resolution*, 1986 ACUS 863
- Marianne K. Smythe, *The Reparations Program at the Commodity Futures Trading Commission: Reducing Formality in Agency Adjudication*, 2 Administrative Law Journal 39 (1988)
- Ann Steinberg, *Federal Grant Dispute Resolution*, 1982 ACUS 137, published in Mezones, Stein & Gruff, *Administrative Law* (1983)

FOR FURTHER INFORMATION

Direct requests for copies of the Request for Neutrals Form, Neutrals Registration Form, or other information to:

**Manager of Roster Services
Administrative Conference of the United States
2120 L Street NW
Suite 500
Washington, DC 20037
202/254-7020**

ACKNOWLEDGMENTS. . . .

The Conference wishes to acknowledge the contributions of the U.S. Environmental Protection Agency ADR Project in the creation of the Roster and the production of this brochure.

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